

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

KENNETH PATTON,

Petitioner,

vs.

STATE OF NEVADA, *et al.*,

Respondents.

2:12-cv-01437-JCM-GWF

**ORDER**

This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, by a Nevada state prisoner. Before the court are respondents' motion to dismiss the amended petition (ECF No. 23) and petitioner's motions to extend prison copywork (ECF Nos. 30 & 31).

**I. Procedural History**

On May 21, 2008, the state filed an amended criminal complaint which charged petitioner with the following five counts: first degree kidnapping resulting in substantial bodily harm, attempted murder, battery constituting domestic violence with substantial bodily harm, assault with a deadly weapon, and robbery with the use of a deadly weapon. (Exhibit 1).<sup>1</sup> On May 21, 2008, after a preliminary hearing, the justice court bound petitioner over on all five counts except attempted murder. (Exhibits 1 & 2).

<sup>1</sup> The exhibits referenced in this order are found in the court's record at ECF Nos. 11-13.

1 The state filed an information on May 22, 2008. (Exhibit 3). At his arraignment on May 29,  
2 2008, petitioner pled not guilty and invoked the 60-day rule. (Exhibit 4). The court set calendar call  
3 for August 27, 2008, and trial for September 2, 2008. (*Id.*).

4 On June 18, 2008, petitioner filed a motion to dismiss appointed counsel Geller and appoint  
5 new counsel because petitioner claimed that Geller failed to communicate with him or visit him at  
6 the Clark County Detention Center (CCDC), and failed to investigate any defense in mitigation of his  
7 sentence. (Exhibit 5). On June 30, 2008, the court denied petitioner's motion. (Exhibit 6).

8 On July 18, 2008, petitioner filed a pretrial petition for a writ of habeas corpus, arguing that  
9 the kidnapping charge should be dismissed because the victim's confinement was incidental to the  
10 battery resulting in substantial bodily harm. (Exhibit 7). The state filed a return to the petition.  
11 (Exhibit 9). On August 20, 2008, the court denied the petition. (Exhibit 10).

12 On October 23, 2008, petitioner filed another motion to dismiss counsel Geller and appoint  
13 new counsel, which was identical to the June 18, 2008 motion. (Exhibit 11). On November 5, 2008,  
14 the court denied the motion. Petitioner then requested to represent himself. The court set a *Faretta*  
15 hearing for November 12, 2008. (Exhibit 12). On November 12, 2008, the court granted petitioner's  
16 motion to represent himself and appointed the public defender as stand-by counsel. (Exhibit 13).

17 On November 17, 2008, petitioner filed a motion for discovery and all favorable evidence.  
18 (Exhibit 14). On November 21, 2008, petitioner filed a motion for a continuance of the September 2,  
19 2008 trial date to February 2009. (Exhibits 15). At the calendar call on November 26, 2008, the  
20 court granted petitioner's motion for discovery and for a continuance, and also granted the state's  
21 motion to amend the information. (Exhibit 16). Trial was re-scheduled for February 23, 2009. (*Id.*).  
22 The amended information was filed on November 26, 2008. (Exhibit 17).

23 On December 8, 2008, petitioner filed another motion to dismiss support-counsel and to  
24 appoint alternate counsel. (Exhibit 18). Petitioner alleged that Geller failed to visit him at CCDC,  
25 failed to provide complete discovery including a transcript of a 911 call from May 1, 2008, failed to  
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1 maintain attorney/client confidentiality during phone conversations, and failed to direct necessary  
2 investigatory personnel to visit him. (*Id.*). At a hearing on the motion, on January 14, 2009,  
3 prosecutor Smith informed the court that he had personally turned over to petitioner all the discovery  
4 he had requested, except for the 911 transcript, which he gave to petitioner in open court. (Exhibit  
5 19). Stand-by counsel Geller informed the court that investigator Everett had visited petitioner; he  
6 also informed the court that he had a copy of the entire file. (*Id.*). The court granted the motion and  
7 appointed counsel Frank Kocka as counsel (not stand-by counsel). (*Id.*). The court continued the  
8 February 23, 2009 trial and set a status check hearing. (*Id.*). At status check hearings on January 21  
9 and 26, 2009, the court set trial for April 20, 2009. (Exhibits 20 & 21).

10 On March 12, 2009, petitioner filed a motion to dismiss support-counsel and appoint  
11 alternate counsel. (Exhibit 22). At a hearing on March 30, 2009, petitioner withdrew the motion.  
12 Attorney Kocka advised the court that he had reviewed all discovery with petitioner. (Exhibit 23).

13 At the calendar call on April 15, 2009, counsel Kocka requested compliance with a subpoena  
14 to obtain records which may have shown that petitioner had an alibi. (Exhibit 24). Counsel Kocka  
15 also requested a continuance. (*Id.*). The court ordered the records to be produced and granted  
16 counsel's motion for a continuance. (*Id.*). Trial was re-set for June 22, 2009. (*Id.*).

17 On April 16, 2009, the state filed a motion to conduct a video-taped deposition of Dr.  
18 Richard Schwartz, who had treated the victim and who would be out of the country at the time of  
19 trial. (Exhibit 25). Petitioner's counsel had no opposition to the motion, and the court granted the  
20 motion. (Exhibit 26). The parties later agreed to call off Dr. Schwartz's deposition, as a different  
21 doctor would testify at trial. (Exhibit 27).

22 On June 22, 2009, the jury trial began; four days later the jury found petitioner guilty of first-  
23 degree kidnapping, battery constituting domestic violence with substantial bodily harm, robbery, and  
24 misdemeanor assault. (Exhibits 28, 29, 30, 31, 32 & 33).

1 At the sentencing hearing on August 10, 2009, the court sentenced petitioner to 5 years to life  
2 on the first-degree kidnapping, a consecutive 12-36 months on the battery constituting domestic  
3 violence with substantial bodily harm, 26-120 months on the robbery, to run concurrently with the  
4 kidnapping sentence, and time served on the assault, with 462 days credit for time served. (Exhibit  
5 34). On August 14, 2009, the judgment of conviction was filed. (Exhibit 35).

6 Petitioner filed a notice of appeal on August 18, 2009. (Exhibit 36). Appellant's opening  
7 brief, filed by counsel Gamage, was filed on March 29, 2010. (Exhibit 37). On April 8, 2010, the  
8 state filed its answering brief. (Exhibit 38). On July 15, 2010, the Nevada Supreme Court filed its  
9 order affirming the convictions. (Exhibit 39). Remittitur issued on August 10, 2010. (Exhibit 40).

10 On October 5, 2010, petitioner filed a motion for the production of documents, papers,  
11 pleadings, and tangible property of defendant. (Exhibit 41). On October 20, 2010, the court granted  
12 petitioner's motion. (Exhibit 42). The court also granted petitioner's motion to withdraw counsel  
13 Gamage. (*Id.*).

14 On December 1, 2010, petitioner filed a motion for discovery which alleged that he didn't  
15 receive discovery. (Exhibit 43). The state filed an opposition. (Exhibit 44). On December 15,  
16 2010, the court granted the motion in part and directed prior counsel Kocka to provide petitioner  
17 with the items not previously provided. (Exhibit 45).

18 On December 27, 2010, petitioner filed another motion for discovery which described  
19 additional documents that he had not received. (Exhibit 46). On January 12, 2011, the court granted  
20 the motion in part and directed prior counsel Gamage to provide the documents to petitioner.  
21 (Exhibit 47).

22 On April 11, 2011, petitioner filed a post-conviction habeas petition and an accompanying  
23 memorandum in the state district court. (Exhibits 48 & 49). On August 12, 2011, the state filed an  
24 opposition to the post-conviction habeas petition. (Exhibit 50). The state district court held a  
25 hearing on the petition on October 24, 2011, at which the court denied the petition. (Exhibit 51). On  
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1 December 22, 2011, the state district court filed findings of fact, conclusions of law, and order  
2 denying the petition, except as to ground 10, concerning a clerical error in the judgment of  
3 conviction. (Exhibit 53). The state district court filed an amended judgment of conviction which  
4 corrected the “first degree kidnapping resulting in substantial bodily harm” language in the original  
5 judgment of conviction to state “first degree kidnapping.” (Exhibit 54; Exhibit 34). Petitioner  
6 appealed the denial of the post-conviction habeas petition. (Exhibit 52).

7 On February 21, 2012, while the appeal from the denial of the post-conviction habeas petition  
8 was pending, petitioner filed a motion for transcripts at state expense in state district court. (Exhibit  
9 55). On March 7, 2012, the state district court heard the matter and denied the motion. (Exhibit 58).  
10 The court’s written order denying the motion was filed on March 28, 2012. (Exhibit 59). Petitioner  
11 appealed. (Exhibit 60). By order filed May 17, 2012, the Nevada Supreme Court dismissed the  
12 appeal for lack of jurisdiction. (Exhibit 61).

13 On July 25, 2012, petitioner filed a motion for an enlargement of time to file a petition for  
14 rehearing of his post-conviction habeas petition. (Exhibit 63). The state district court denied the  
15 motion at a hearing on August 6, 2012. (Exhibit 65). The state district court filed a written order  
16 denying the motion on August 20, 2012. (Exhibit 66).

17 On October 8, 2012, the Nevada Supreme Court issued its order affirming the district court’s  
18 denial of the post-conviction habeas petition. (Exhibit 67). Remittitur issued on November 2, 2012.  
19 (Exhibit 68).

20 On August 8, 2012, petitioner dispatched his original federal habeas petition to this court.  
21 (ECF No. 1-1). By order filed January 31, 2013, the court ordered the original petition to be filed by  
22 the clerk and directed a response to the petition. (ECF No. 6). The petition was filed on that date.  
23 (ECF No. 7). Respondents filed a motion to dismiss on March 18, 2013. (ECF No. 9). On April 15,  
24 2013, petitioner filed a motion to amend the petition, along with a proposed amended petition. (ECF  
25 Nos. 18 & 18-1). Respondents did not oppose the motion. (ECF No. 20). On April 30, 2013, the  
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1 court granted petitioner's motion to file an amended petition and denied respondents' motion to  
2 dismiss without prejudice. (ECF No. 21). The amended federal petition was filed at ECF No. 22.  
3 Petitioner's amended federal petition contains ten grounds which are identical to the ten grounds  
4 petitioner raised in his post-conviction habeas petition and memorandum filed in state district court.  
5 (*Compare* ECF No. 22 to Exhibit 49).

6 Respondents have filed a motion to dismiss the amended petition. (ECF No. 23). Petitioner  
7 filed an opposition to the motion. (ECF No. 27). Petitioner has filed two motions to extend his  
8 prison copywork limit. (ECF Nos. 30 & 31). Petitioner has also filed a motion to submit pleadings,  
9 seeking a decision on respondents' motion to dismiss. (ECF No. 29). Petitioner's motion to submit  
10 pleadings is rendered moot by this order, and is denied.

## 11 **II. Discussion**

### 12 **A. Petitioner's Motions to Extend Copywork Limit (ECF Nos. 30 & 31)**

13 Before addressing respondents' motion to dismiss the amended petition, the court addresses  
14 petitioner's two motions to extend his prison copywork limit, filed November 12, 2013, and January  
15 3, 2014. (ECF Nos. 30 & 31). Petitioner, using an identical pre-typed form for both motions, asserts  
16 that he has reached or exceeded his \$100.00 limit for copywork pursuant to the Nevada Department  
17 of Corrections' administrative regulation 722.12. (*Id.*). Petitioner asserts that he seeks a reasonable  
18 allowance of copywork for the purpose of filing "amended pleadings, motions, responses, replies,  
19 notices, etc." (*Id.*). The court notes that, on July 10, 2013, petitioner filed his opposition to  
20 respondents' motion to dismiss the amended petition. (ECF No. 27). As such, petitioner has filed  
21 the only response that was due from him at this juncture. Petitioner's motions to extend his prison  
22 copywork limit do not specify any other reason that petitioner currently needs to file copywork in the  
23 litigation of this action. As such, petitioner's motions to extend his copywork limit are denied.

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1           **B. Respondents' Motion to Dismiss (ECF No. 23)**

2                   **1. Procedural Default Arguments**

3                           **a. Procedural Default Standard**

4           Respondents argue that grounds 1, 3, 4, 5, and 7 of the amended petition, or certain claims  
5 within those grounds, were procedurally defaulted in state court and should be dismissed from this  
6 federal habeas corpus action. "Procedural default" refers to the situation where a petitioner in fact  
7 presented a claim to the state courts but the state courts disposed of the claim on procedural grounds,  
8 instead of on the merits. A federal court will not review a claim for habeas corpus relief if the  
9 decision of the state court regarding that claim rested on a state law ground that is independent of the  
10 federal question and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 730-31  
11 (1991). The *Coleman* Court stated the effect of a procedural default, as follows:

12                               In all cases in which a state prisoner has defaulted his federal claims in  
13 state court pursuant to an independent and adequate state procedural  
14 rule, federal habeas review of the claims is barred unless the prisoner  
15 can demonstrate cause for the default and actual prejudice as a result of  
16 the alleged violation of federal law, or demonstrate that failure to  
17 consider the claims will result in a fundamental miscarriage of justice.

18 *Coleman*, 501 U.S. at 750; *see also Murray v. Carrier*, 477 U.S. 478, 485 (1986). The procedural  
19 default doctrine ensures that the state's interest in correcting its own mistakes is respected in all  
20 federal habeas cases. *See Koerner v. Grigas*, 328 F.3d 1039, 1046 (9<sup>th</sup> Cir. 2003). In order for the  
21 procedural bar doctrine to apply and preclude federal review, the state court must actually rely on the  
22 procedural bar as a separate basis for its disposition of the claim. *See Harris v. Reed*, 489 U.S. 255,  
23 261-62 (1989). If the state court reaches the merits of a claim instead of relying on a procedural bar,  
24 the claim is not procedurally defaulted in state court and the federal court may review the merits of  
25 the claim. *Harris*, 489 U.S. at 262-63. "Unless a court expressly states that it is relying upon a  
26 procedural bar, [the court] must construe an ambiguous state court response as acting on the merits  
of the claim, if such a construction is plausible." *Chambers v. McDaniel*, 549 F.3d 1191, 1197 (9<sup>th</sup>  
Cir. 2008).

**b. Certain Grounds of the Amended Petition are Procedurally Defaulted**

The grounds of the amended federal petition are identical to the grounds raised in petitioner's state post-conviction habeas petition and memorandum. (*Compare* ECF No. 22 *with* Exhibit 49).

On appeal from the denial of petitioner's state habeas petition, the Nevada Supreme Court reached decision on petitioner's many claims of ineffective assistance of trial and appellate counsel. (Exhibit 67). However, as to the claims independent of the ineffective assistance of counsel claims, the Nevada Supreme Court found such claims procedurally defaulted. The Nevada Supreme Court explicitly cited NRS 34.810(1)(b)(3), and ruled:

To the extent that appellant raised any claims independently from his claims of ineffective assistance of trial [and appellate] counsel, those claims were waived as they could have been raised on direct appeal and appellant failed to demonstrate good cause and prejudice for his failure to do so. NRS 34.810(1)(b)(3).

(Exhibit 67, at p. 1, n.2 & p. 8, n.9).

**1. Ground 1**

In ground 1 of the amended petition, petitioner alleges that NRS 200.310(1), the kidnapping statute, is unconstitutional under the Fourteenth Amendment because it is vague, ambiguous, and overly broad. (ECF No. 22, at pp. 3-13). Because this claim was independent of the ineffective assistance of counsel claims in the post-conviction petition, the Nevada Supreme Court found the claim procedurally defaulted, explicitly citing NRS 34.810(1)(b)(3) and petitioner's failure to demonstrate good cause and prejudice for failing to raise the issue on direct appeal. (Exhibit 67, at p. 1, n.2 & p. 8, n.9). The Ninth Circuit Court of Appeals has held that, at least in non-capital cases, application of the procedural bar at issue in this case – NRS 34.810 – is an independent and adequate state ground. *Vang v. Nevada*, 329 F.3d 1069, 1073-75 (9<sup>th</sup> Cir. 2003); *see also* *Bargas v. Burns*, 179 F.3d 1207, 1210-12 (9<sup>th</sup> Cir. 1999). This court finds that petitioner's claim in ground 1 of the amended petition that NRS 200.310(1) is unconstitutionally vague, ambiguous, and overly broad was procedurally defaulted by the Nevada Supreme Court on independent and adequate state law



1 grounds. Ground 1 of the amended petition is procedurally barred from review by this court and will  
2 be dismissed with prejudice.

### 3 **2. Ground 3**

4 In ground 3 of the amended petition, petitioner alleges several claims of ineffective assistance  
5 of counsel. (ECF No. 22, at pp. 19-23). Petitioner also claims that “the court misled the jury by  
6 saying all three knife [knives] came from the same place” but the evidence showed that one of the  
7 knives was recovered from the victim’s purse while she was at the hospital. (*Id.*).

8 The Nevada Supreme Court reached a decision on the ineffective assistance of counsel claims  
9 raised in ground 3 of the petition. (Exhibit 67). Because the Nevada Supreme Court ruled on the  
10 merits of the ineffective assistance of counsel claims, this court will not dismiss such claims as  
11 procedurally defaulted. *See Harris*, 489 U.S. at 262-63; *see also Chambers*, 549 F.3d at 1197. The  
12 only claim within ground 3 that is independent of the ineffective assistance of counsel claim is  
13 petitioner’s claim that “the court misled the jury by saying all three knife [knives] came from the  
14 same place.” (ECF No. 22, at pp. 21, 23). As to the claims independent of the ineffective assistance  
15 of counsel claims, the Nevada Supreme Court found such claims procedurally defaulted, explicitly  
16 citing NRS 34.810(1)(b)(3). (Exhibit 67, at p. 1, n.2 & p. 8, n.9). This court finds that the portion of  
17 ground 3 which claims that “the court misled the jury by saying all three knife [knives] came from  
18 the same place” was procedurally defaulted by the Nevada Supreme Court on independent and  
19 adequate state law grounds. That single claim is procedurally barred from review by this court and  
20 will be dismissed. The remaining claims of ineffective assistance of counsel within ground 3 are not  
21 procedurally barred and shall proceed.

### 22 **3. Ground 4**

23 Ground 4 of the amended petition contains several claims of ineffective assistance of counsel.  
24 (ECF No. 22, at pp. 23-27). The Nevada Supreme Court, applying the standard in *Strickland v.*  
25 *Washington*, 466 U.S. 668 (1984), reached a decision on the merits of the ineffective assistance of  
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1 counsel claims raised in ground 4 of the amended petition. (Exhibit 67, at pp. 5-10). Because the  
2 Nevada Supreme Court ruled on the merits of the ineffective assistance of counsel claims, this court  
3 will not dismiss such claims as procedurally defaulted. *See Harris*, 489 U.S. at 262-63; *see also*  
4 *Chambers*, 549 F.3d at 1197.

5       Petitioner also alleges in ground 4 that his rights to due process, equal protection, the  
6 confrontation clause, and a fair trial were violated. Respondents argue these claims should be  
7 dismissed as procedurally barred. To the extent that petitioner claims that his rights to due process,  
8 equal protection, confrontation clause, and a fair trial were violated, such claims are independent of  
9 petitioner's ineffective assistance of counsel claims. The Nevada Supreme Court found such claims  
10 procedurally defaulted, explicitly citing NRS 34.810(1)(b)(3). (Exhibit 67, at p. 1, n.1, p. 8, n.9).  
11 This court finds that the due process, equal protection, confrontation clause, and fair trial claims  
12 within ground 4 were procedurally defaulted by the Nevada Supreme Court on independent and  
13 adequate state law grounds of NRS 34.810(1)(b)(3). As such, these claims are procedurally barred  
14 from review by this court and will be dismissed. However, because the Nevada Supreme Court ruled  
15 on the merits of petitioner's claims of ineffective assistance of counsel within ground 4, those claims  
16 were not procedurally defaulted and they shall proceed.

#### 17                                   **4. Ground 5**

18       Respondents argue that ground 5 should be dismissed as procedurally defaulted and as  
19 conclusory. Petitioner alleges that appellate counsel should have argued that the district court made  
20 a public display of sympathy for the victim when he offered her a tissue during trial. (ECF No. 22, at  
21 pp. 27, 29). The Nevada Supreme Court reached a decision on the merits of the claim that appellate  
22 counsel was ineffective for failing to argue that the district court made a public display of sympathy  
23 for the victim when he offered the victim a tissue. (Exhibit 67, at p. 11). Because the Nevada  
24 Supreme Court ruled on the merits the ineffective assistance of counsel claim, this court will not  
25 dismiss ground 5 as procedurally defaulted. *See Harris*, 489 U.S. at 262-63; *see also Chambers*, 549  
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1 F.3d at 1197. Ground 5, petitioner's claim that appellate counsel was ineffective for failing to argue  
 2 that the district court made a public display of sympathy for the victim when he offered the victim a  
 3 tissue, shall proceed.

#### 4 **5. Ground 7**

5 In ground 7 of the amended petition, petitioner alleges several claims of ineffective assistance  
 6 of counsel. (ECF No. 22, at pp. 32-37). Petitioner also claims that his rights to due process and a  
 7 fair trial were violated by erroneous jury instructions. (*Id.*). The Nevada Supreme Court reached a  
 8 decision on the merits of the ineffective assistance of counsel claims raised in ground 7 of the  
 9 amended petition. (Exhibit 67, at pp. 6-11). Because the Nevada Supreme Court ruled on the merits  
 10 of the ineffective assistance of counsel claims, this court will not dismiss such claims as procedurally  
 11 defaulted. *See Harris*, 489 U.S. at 262-63; *see also Chambers*, 549 F.3d at 1197.

12 Respondents argue that petitioner's claims of being deprived of a fair trial and due process  
 13 are procedurally barred. To the extent that petitioner alleges that jury instructions violated his rights  
 14 to due process and a fair trial, such claims are independent of petitioner's ineffective assistance of  
 15 counsel claims. The Nevada Supreme Court found such claims procedurally defaulted, explicitly  
 16 citing NRS 34.810(1)(b)(3). (Exhibit 67, at p. 1, n.1, p. 8, n.9). This court finds that the due process  
 17 and fair trial claims within ground 7 were procedurally defaulted by the Nevada Supreme Court on  
 18 independent and adequate state law grounds of NRS 34.810(1)(b)(3). As such, these claims are  
 19 procedurally barred from review by this court and will be dismissed. However, because the Nevada  
 20 Supreme Court ruled on the merits of petitioner's claims of ineffective assistance of counsel within  
 21 ground 7, those claims were not procedurally defaulted and they shall proceed.

#### 22 **c. Cause and Prejudice**

23 To demonstrate cause for a procedural default, the petitioner must be able to "show that some  
 24 *objective factor external to the defense* impeded" his efforts to comply with the state procedural rule.  
 25 *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (emphasis added). For cause to exist, the external  
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1 impediment must have prevented the petitioner from raising the claim. *See McCleskey v. Zant*, 499  
2 U.S. 467, 497 (1991). If the petitioner fails to show cause, the court need not consider whether the  
3 petitioner suffered actual prejudice. *Engle v. Isaac*, 456 U.S. 107, 134 n.43 (1982); *Roberts v.*  
4 *Arave*, 847 F.2d 528, 530 n.3 (9th Cir. 1988).

5 Petitioner has not asserted any reason for his failure to properly raise his procedurally  
6 defaulted claims on direct appeal. Neither the petition itself, nor petitioner's other filings, asserts  
7 any argument of cause and prejudice to excuse the procedural default. This court finds that  
8 petitioner's claims independent of his ineffective assistance of counsel claims were procedurally  
9 defaulted in state court, and petitioner has failed to show cause and prejudice to excuse the  
10 procedural default. As such, the claims are barred from review by this court, and will be dismissed  
11 with prejudice.

## 12 **2. Non-Cognizable Claim and Mootness Arguments**

### 13 **a. Ground 8**

14 Respondents seek dismissal of ground 8 on the basis that petitioner fails to allege specific  
15 facts to support a cognizable claim for federal habeas corpus relief. Ground 8 of the amended  
16 petition states as follows, in its entirety: "statement (under penalty of perjury) see Ex-275, Ex-276,  
17 Ex-277, Ex-278." (ECF No. 22, at p. 37).

18 A state prisoner is entitled to federal habeas relief only if he is being held in custody in  
19 violation of the constitution, laws, or treaties of the United States. 28 U.S.C. § 2254(a). Pursuant to  
20 Rule 2(c) of the Rules Governing Section 2254 Cases, a federal habeas petition must specify all  
21 grounds for relief and "state the facts supporting each ground." Unless an issue of federal  
22 constitutional or statutory law is implicated by the facts presented, the claim is not cognizable under  
23 federal habeas corpus. *Estelle v. McGuire*, 502 U.S. 62, 68 (1991). Petitioner must demonstrate the  
24 existence of federal constitutional law which establishes the right in question. In ground 8, petitioner  
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1 does not allege a violation of any federal constitutional right. Therefore, ground 8 is dismissed for  
2 failure to state a cognizable claim for federal habeas corpus relief.

3 **b. Ground 10**

4 Respondents argue that ground 10 of the amended petition should be dismissed because it is  
5 now moot. Article II, section 2 of the United States Constitution provides that the “exercise of  
6 judicial power depends on the existence of a case or controversy.” *Liner v. Jafco, Inc.*, 375 U.S. 301,  
7 306, n.3 (1964). “The case or controversy requirement subsists through all stages of federal judicial  
8 proceedings, trial and appellate . . . the parties must continue to have a personal stake in the outcome  
9 of the lawsuit.” *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-78 (1990) (internal quotations  
10 omitted). Mootness occurs when there is no longer a case or controversy. *Spencer v. Kemna*, 523  
11 U.S. 1, 7 (1998).

12 In ground 10 of the amended petition, petitioner argues that his original judgment of  
13 conviction is erroneous because it states that he was convicted of “first degree kidnapping resulting  
14 in substantial bodily harm.” (ECF No. 22, at p. 39). As stated earlier in this order, the amended  
15 federal petition contains ten grounds which are identical to the ten grounds petitioner raised in his  
16 post-conviction habeas petition and memorandum filed in state district court on April 11, 2011.  
17 (*Compare* ECF No. 22 to Exhibit 49). On December 22, 2011, the state district court filed findings  
18 of fact, conclusions of law, and order denying the state habeas petition, except as to ground 10,  
19 concerning a clerical error in the original judgment of conviction. (Exhibit 53). The state district  
20 court filed an amended judgment of conviction which corrected the “first degree kidnapping  
21 resulting in substantial bodily harm” language in the original judgment of conviction to state “first  
22 degree kidnapping.” (Exhibit 54; Exhibit 34). Because petitioner has obtained relief on his claim in  
23 the state court, ground 10 is moot. Because there is no longer a controversy as to ground 10 of the  
24 amended petition, it is dismissed with prejudice.

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1 **III. Conclusion**

2 **IT IS THEREFORE ORDERED** that petitioner's motions to extend his prison copywork  
3 limit (ECF Nos. 30 & 31) are **DENIED**.

4 **IT IS FURTHER ORDERED** that petitioner's motion to submit pleadings (ECF No. 29) is  
5 **DENIED**.

6 **IT IS FURTHER ORDERED** that the respondents' motion to dismiss (ECF No. 23) is  
7 **GRANTED in part**, as follows:

- 8 1. Ground 1 of the amended petition is **DISMISSED WITH PREJUDICE** as  
9 procedurally barred.
- 10 2. The portion of ground 3 claim which claims that "the court misled the jury by saying  
11 all three knife [knives] came from the same place" is **DISMISSED WITH**  
12 **PREJUDICE** as procedurally barred.
- 13 3. The due process, equal protection, confrontation clause, and fair trial claims within  
14 ground 4 are **DISMISSED WITH PREJUDICE** as procedurally barred.
- 15 4. The fair trial and due process claims within ground 7 are **DISMISSED WITH**  
16 **PREJUDICE** as procedurally barred.
- 17 5. Ground 8 of the amended petition is **DISMISSED WITH PREJUDICE** for failure  
18 to state a cognizable claim for federal habeas corpus relief.
- 19 6. Ground 10 of the amended petition is **DISMISSED WITH PREJUDICE** as moot.

20 **IT IS FURTHER ORDERED** that this action **SHALL PROCEED** on the following  
21 grounds of the amended petition:

- 22 1. Ground 2, in its entirety.
- 23 2. The ineffective assistance of counsel claims raised in ground 3.
- 24 3. The ineffective assistance of counsel claims raised in ground 4.
- 25 4. Ground 5, in its entirety.
- 26 5. Ground 6, in its entirety.
6. The ineffective assistance of counsel claims raised in ground 7.
7. Ground 9, in its entirety.

1           **IT IS FURTHER ORDERED** that respondents **SHALL FILE AND SERVE AN**  
2 **ANSWER** to the remaining grounds of the amended petition within **thirty (30) days** from the entry  
3 of this order. The answer shall include substantive arguments on the merits of the remaining grounds  
4 of the amended petition. **No further motions to dismiss will be entertained.**

5           **IT IS FURTHER ORDERED** that petitioner **SHALL FILE AND SERVE A REPLY** to  
6 the answer, within **thirty (30) days** after being served with the answer.

7                               Dated March 14, 2014.

8  
9   *James C. Mahan*  
10    \_\_\_\_\_  
  UNITED STATES DISTRICT JUDGE